

Abbas Vs. Moideen Kunhi

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Court : Kerala

Decided On : Aug-08-2014

Judge : Honourable Mr.Justice T.R.Ramachandran Nair

Appellant : Abbas

Respondent : Moideen Kunhi

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE T.R.RAMACHANDRAN NAIR & THE HONOURABLE SMT. JUSTICE P.V.ASHA FRIDAY, THE 8TH DAY OF AUGUST 2014 17TH SRAVANA, 1936 FAO.No. 146 of 2014 () -----
AGAINST THE

ORDER

IN I.A.NOS.474/13 & 475/13 IN OS1242011 OF SUB COURT, KASARAGOD
APPELLANT/APPLICANT/DEFENDANT NO.2 IN SUIT:-:
----- ABBAS, S/O.ABDULRAHIMAN,
CHENINADKAM POST, KODIYAMME ICHLAMPADY VILLAGE, KASARAGOD
TALUK AND DISTRICT PIN - 671 321, REPRESENTED BY HIS POWER OF
ATTORNEY HOLDER S.ABDULLA S/O.MAMMUNHI KAYYAR, RESIDING AT
BATHERI HOUSE SHIRIYA, VIA KUMBLA, KASARAGOD TALUK AND
DISTRICT PIN - 671 321. BY ADVS.SRI.S.V.BALAKRISHNA IYER (SR.)
SRI.P.B.KRISHNAN SRI.P.M.NEELAKANDAN SRI.P.B.SUBRAMANYAN

SRI.SABU GEORGE RESPONDENTS/RESPONDENTS IN I.AS. - PLAINTIFF & DEFENDANT NO.1 IN SUIT:-: ----- 1. MOIDEEN KUNHI, AGED 56 YEARS S/O.MOOSAKUNHI, RESIDING AT MADHUR MADHUR VILLAGE AND POST, KASARAGOD - 671 124.

2. ABDUL RAHIMAN, AGED 65 YEARS S/O.MOIDEEN, RESIDING AT CHENKINADKAM ICHLAMPADY VILLAGE, KASARAGOD TALUK, KODYAMME POST, PIN - 671 321. R1 BY ADV. SRI.KODOTH SREEDHARAN THIS FIRST APPEAL FROM

ORDER

S HAVING BEEN FINALLY HEARD ON 23/07-2014, THE COURT ON 08/08-2014 DELIVERED THE FOLLOWING: "C.R" T.R.RAMACHANDRAN NAIR & P.V ASHA, JJ.

----- F.A.O No.146 of 2014-C
----- Dated this the 8th day of August, 2014

JUDGMENT

Asha, J.

Whether the summons served on an adult member of the family amounts to proper service, is the issue involved in this case.

2. The appellant was set *ex parte* in a suit filed by the 1st respondent praying for a decree for return of advance amount paid on the basis of an agreement for sale entered into between the appellant and the 1st respondent. The appellant's father who executed the agreement for sale in his capacity as the power of attorney holder of the appellant was the 1st defendant, who is the 2nd respondent herein. Original Suit No.124 of 2011 was filed by the 1st respondent on 03.12.2011 before the court of the Subordinate Judge, Kasaragode. Summons was issued from the court on 15.12.2011 fixing date for appearance of defendants as 07.01.2012. On 22.12.2011, the 1st defendant/2nd respondent herein received the summons issued to him. The process server F.A.O No.146 of 2014-C2 served the summons

issued to the appellant herein also on the 1st defendant himself, who is the father of the appellant.

3. The 1st defendant appeared in court through an Advocate on 07.01.2012. The 2nd defendant did not enter appearance. The suit was decreed on 26.03.2013 as against the 2nd respondent/1st defendant on merits and decreed exparte as against the appellant/2nd defendant herein.

4. While E.P.No.41 of 2013 filed by the 1st respondent for executing the decree was pending, the appellant filed I.A.Nos.474 of 2013 and 475 of 2013 for setting aside the exparte decree as against him and to condone the delay in filing the same, through a new power of attorney holder - the father-in-law of the appellant. In the affidavit in support of the I.As, the power of attorney holder stated that he came to know about the exparte decree against his son-in-law on 27.06.2013, when he was attending a marriage function and he filed the petition after getting a power of attorney from his son-in-law - the appellant, after contacting the Advocate who appeared for the 2nd respondent. Thus the petitions were filed on 29.07.2013 along with a petition to condone the delay, saying that the appellant did not receive any summons or copy of the plaint. Therefore, it was contended that the impugned order was passed on 26.03.2013 F.A.O No.146 of 2014-C3 without giving the appellant an opportunity of being heard and that the appellant was working in Saudi Arabia during the period from 07.01.2012 onwards.

5. The 1st respondent resisted the I.As and filed a counter affidavit saying that it is only a collusive affair among the defendants in the suit in order to protract the matter. The 1st respondent opposed the appearance of the appellant through a new power of attorney holder - his father in law, without cancelling the power of attorney already executed in favour of his father, who is the 1st defendant in the suit.

6. 2 witnesses - AW1 and AW2, were examined and Exts.A1 to A3 were marked on the side of the appellant. The report of the process server was marked as Ext.C1. The court below considered the issue on the basis of the pleadings in the I.A as well as the evidence on record.

7. The court below found that the process server had served the summons on the petitioner's father at his residence, on being informed that the appellant/2nd defendant was in Gulf countries and therefore the service of summons was proper as evident from Ext.C1 report of the process server. Contention raised by the appellant that provisions under Order V Rules 15, 17 and 19 of Civil F.A.O No.146 of 2014-C4 Procedure Code (hereinafter referred to as 'CPC') were not duly complied with, in support of his plea for setting aside the impugned order was found untenable. On a perusal of the order sheet of the court, it was found that the 1st defendant, who is none other than the father of the appellant/2nd defendant, had entered appearance through his counsel on 07.01.2012 itself and that the court had recorded the undertaking of the counsel for the 1st defendant to file vakalat on behalf of the 2nd defendant also. It also took notice of the fact that the very same counsel who was appearing for the father/1st defendant, was appearing for the petitioner/appellant in the I.A also. The appellant was set exparte on 08.02.2012 as he did not enter appearance. The court below also noticed that the 1st defendant had filed written statement and contested the suit and the suit was decreed on merits as against him on 26.03.2013. After elaborate consideration of the evidence adduced and the records of the case, the court below found that service of summons on the 2nd defendant/appellant was proper, in the manner provided under Order V Rule 15 C.P.C and dismissed the I.As, by order dated 11.03.2014.

8. This appeal is filed as against those orders, again on the main contention that the appellant was set exparte without serving F.A.O No.146 of 2014-C5 summons on him in accordance with the provisions contained in Order V of C.P.C. We heard Sri S.V.Balakrishna Iyer, learned Senior Counsel for the appellant and Sri Kodoth Sreedharan, the learned counsel for the 1st respondent, and considered the issue with reference to their arguments, the pleadings and evidence on record.

9. The contentions of the appellant are, that service of the summons to the 2nd defendant on the father of the appellant (who is the 1st defendant also), will not amount to proper service as contemplated in the provisions of Rule 15 of Order V; that the mandatory provisions under Rules 15, 17 and 19 of Order V are not complied with; the process server did not make any attempt to serve notice on his

address in Gulf, etc. According to him, the process server was expected to return the summons along with a verified report in the form of an affidavit stating that there was no likelihood of the defendant being found at his residence within a reasonable time and he could have served the summons on the adult member only after submitting such report, on further orders on it; and an enquiry should have been conducted by the court below before declaring service of summons on the absentee defendant. In short, according to the appellant, the service of summons on an adult member cannot be said to be proper, except after an enquiry is F.A.O No.146 of 2014-C6 conducted by the court, after getting a report from the process server, as provided in Rule 19 of order V.

10. Procedure regarding service of summons is provided in Rules 9 to 31 of Order V of Civil Procedure Code. Rule 12 provides that wherever it is practicable, summons shall be served on defendant in person, unless he has an agent empowered to accept service. Service of summons on adult member of the family of defendant is sufficient in the circumstances provided in Rule 5 of Order V, which reads as follows: "15. Where service may be on an adult member of defendant's family:-- Where in any suit the defendant is absent from his residence at the time when the service of summons is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time and he has no agent empowered to accept service of the summons on his behalf, service may be made on any adult member of the family, whether male or female, who is residing with him." Thus it can be seen that before serving summons on an adult member, (i) all efforts should be made to serve the summons at the residential address of the defendant, (ii) in the event of his absence there, the possibility of his availability at the residence should be ascertained. If on such inquiry, it is assured that there is no likelihood of the F.A.O No.146 of 2014-C7 defendant being found at the residence within a reasonable time, and if he has not empowered any agent to accept the summons on his behalf, the process server can serve the summons, on an adult member available at his residential address.

11. On a perusal of the report Ext.C1 of the process server, we find that the process server has served the summons on the father of the 2nd defendant who

was available in the residential address of the 2nd defendant. The summons to the 1st defendant also was served simultaneously. It is seen that the father Sri Abdul Rahiman, the 1st defendant who accepted the summons on his behalf in his capacity as the 1st defendant and on behalf of the 2nd defendant, told the process server that his son, who is the 2nd defendant, was in Gulf and assured that he will inform the matter to the 2nd defendant. The report reads as follows: F.A.O No.146 of 2014-C8

From the above report, it can be seen that summons was served on the father of the 2nd defendant, who is an adult member of the family of the 2nd defendant, in the residential address of 2nd defendant, only after getting reliable information that the 2nd defendant was working in Gulf countries and was not likely to be available within a reasonable time. Therefore, the service of summons as per Ext.C1 was perfectly in accordance with the provisions contained in Rule 15 of Order V. F.A.O No.146 of 2014-C9

12. The provisions contained in Rules 17 and 19 are not applicable in a case where service is already effected on an adult member of the family of the defendant. Rule 17 provides for the procedure when the defendant refuses to accept service or cannot be found. It is only when there is no other person on whom service can be made, that the affixture is provided for in the circumstances stated therein. When there is already an adult member at the residence of the defendant on whom service can be effected under Rule 15, the procedural formalities contemplated in Rule 17 need not be observed. Rule 19 provides for examination of the serving officer and further inquiry, only when the summons is returned under Rule 17. Such a procedure is not contemplated when summons is served on an adult member, under Rule 15. In the present case the process server has submitted his report, as provided in Rule 18, explaining the incidents of 22.12.2011, before the Central Nazir on 28.12.2011, duly verified in the form of affidavit. In the above circumstances, we are of the opinion that there was proper notice on the 2nd defendant/appellant by effecting service on the 1st defendant, who is an adult member, in the residential address given in the plaint and hence the findings of the court below are perfectly legal. F.A.O No.146 of 2014-C10

13. The Full Bench decision of Travancore Cochin High Court - Krishna Pillai v. Sahul Hameed [1953 KLT802 supports our view, in affirming the findings of the court below. There the Full Bench was considering a large number of cases involving revenue sales, wherein the sales were under challenge for non

compliance of the provisions relating to issue and service of demand notice under Revenue Recovery Act. In para.62 thereof, the 4 requirements to be satisfied before a service can be held to be valid under Order V Rule 15 (as it stood then) was discussed, following the decision reported in *Meera v. Narayani Amma* [20 TLJ509 in which it was held that the rule was applicable only (1) where the defendant cannot be found after an honest endeavour by the process server to effect personal service of summons (2) only in the absence of an agent empowered to accept service of summons (3) the service should be made on an adult male member and (4) such member of the family should be one residing with the defendant. In that case the Full Bench found that no attempt was made by the Peon to serve notice personally on the defendant and hence there was no proper notice as provided under Order V Rule 15. The relevant portion reads as follows: F.A.O No.146 of 2014-C11"62. xxxx. With regard to the service of summons under Order V, Rule 15, of the Code of Civil Procedure this is what Mulla says in his commentaries on the Code of Civil Procedure (11th Edition, page 561): "Where no attempt is made to find the defendant, and the summons is served on his son, the summons: cannot be said to be duly served. The enquiry as to the whereabouts of the defendant must not be perfunctory." In *Meera v. Narayani Amma* (20 T. L. J.

509) the Travancore High Court held that four conditions should be satisfied before a service could be held to be valid under Order V, Rule 15 of the Code of Civil Procedure, namely, (1) the rule is applicable only where the defendant cannot be found after an honest endeavour by the process server to effect personal service of the summons; (2) the rule can be resorted to only in the absence of an agent empowered to accept service of summons; (3) the service would-be futile unless made on an adult male member of the defendant's family; and (4) such member of the family should be one residing with the defendant. It has been held in various cases that it is only if the defendant cannot be found in spite of efforts made in that behalf by the process server that "summons can be served on an adult member of his family residing with him. (Vide *Bharam Chand Guin v. Kanak Sarkar* (26 Calcutta Weekly Notes 359) *Hardayal v. Pt. Sant Das* (10 Indian Cases 242 and *Makhan Das v. Mannu Lal* (35 Allahabad 556). In the absence of anything in the endorsement in Ex. XXXVIII or of any evidence to show that it was because *Narayani Pillai* could not be found that the notice was served on her son, it has to

be held that the notice was not served according to law. xxxxxxxx" In Joesph Vs Catholic Syrian Bank reported in 1998(1) KLT986F.A.O No.146 of 2014-C12a division Bench of this court, while considering the effect of service of notice of sale proclomation on one of the judgment debtors held as follows : "10. Xxxxxx From the endorsement of the process server, it is crystal clear that the 7th judgment debtor is not residing with the appellant. Therefore, a subsequent notice under O. XXIR. 66(2) CPC cannot be said to be effectively served on the appellant, as notice was served not on him personally but on the 7th judgment debtor who was not residing with him. As notice was served on a person who was not residing with the appellant, we hold that it cannot be said that proper notice was served on the appellant as per O. V R. 15 CPC. " In Mulla, The Code of Civil Procedure, - 18th Edition, 2011 (page 1660 & 1661), it is explained as follows: "Service on any adult member of the family, male or female is sufficient provided the conditions set out in the rule are satisfied, viz, the absence of defendant from his residence, no likelihood of his being found at the residence within a reasonable time and there being no agent empowered to accept service. xxxxxxxxxxxx Requirement of law for service of summons is that attempt should be made to serve the notice personally on the party unless there is no agent empowered to accept service on behalf of the party., Where however summons is served on on an adult member of the family in the absence of the party, the process server has to take care and caution to of noting down the name and details of the adult member of the family." 14. In the present case it can be seen that service was F.A.O No.146 of 2014-C13effected at the residential address itself, when the 2nd defendant was admittedly abroad. The appellant did never have a case that he was likely to be available in the address given, within a reasonable time. Moreover, it was the father of the 2nd defendant - an adult member of the family, who accepted the summons along with an assurance that he will inform the party. These matters find place in the report of the process server. In such circumstances, it cannot be said that there should have been a further enquiry into the matter in order to declare the service on 2nd defendant as proper, after which alone the 2nd defendant could be set ex-parte.

15. It is also pertinent to note that the suit was filed for refund of advance sale consideration pursuant to an agreement for sale executed by the 2nd defendant

and this agreement for sale was executed by the 1st defendant in his capacity as power of attorney holder of the 2nd defendant. On examination of the power of attorney executed on behalf of the father, it is seen that the same was executed on 28.10.2008 authorising the father - 1st defendant, inter alia, to defend, continue etc. all suits or other proceedings before all courts, to sign all pleadings, affidavits, applications etc.; to appoint Advocates, etc. (clause 7 and 8 thereof). Thus in fact the F.A.O No.146 of 2014-C141st defendant was the agent of the 2nd defendant also, in addition to his being an adult member of the family. It is to be noticed that Rule 3 of Order III of C.P.C provides that processes served on the recognised agent of a party shall be as effective as if the same has been served on the party in person, unless the court otherwise directs. Therefore the service on the 1st defendant was proper under the above provision also. A new power of attorney has been executed in favour of the father in law of the appellant only for the purpose of filing a petition for setting aside exparte order, as evident from the affidavit in support of the I.As, and the same is seen executed only on 12.07.2013. In the above circumstances, we do not find any reason to interfere with the findings arrived at by the court below. The appeal therefore fails and is dismissed. There shall be no order as to costs. Sd/- T.R.RAMACHANDRAN NAIR Judge Sd/- P.V.ASHA Judge rtr/ /true copy/ P.S to Judge

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